No. 99-210

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

HOSPITAL SERVICE DISTRICT NO. 1 OF TANGIPAHOA PARISH, *et al.*,
Petitioners,
v.
SURGICAL CARE CENTER OF HAMMOND, L.C.,
Respondent.

RICHLAND PARISH HOSPITAL SERVICE DISTRICT 1-B, *et al.*,
Petitioners,
v.
RALPH ABRAHAM, M.D., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review the unanimous, fact-bound, and interlocutory rulings of the Fifth Circuit below that under the standards for determining when local government entities are entitled to state action immunity—recently clarified by this Court in *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), and *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34 (1985)—petitioners are not entitled to blanket immunity for their anticompetitive conduct.

RULE 29.6 STATEMENT

Respondent Surgical Care Center of Hammond, L.C. notes that it is a private limited liability company d/b/a St. Luke's SurgiCare; a majority of its stock is held by Amedisys Surgery Centers, L.C., a private limited liability company that is a wholly owned subsidiary of Amedisys, Inc., a publicly traded Delaware corporation.

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BRIEF IN OPPOSITION

Respondents respectfully request that the Court deny the petition for a writ of certiorari seeking review of the judgments of the United States Court of Appeals for the Fifth Circuit in these cases.

INTRODUCTION

The petition does not meet any of the established criteria warranting certiorari. *See* S. Ct. Rule 10. The Fifth Circuit decisions below that petitioners are not entitled

to state action immunity for their anticompetitive conduct do not conflict with any of this Court's precedents. To the contrary, the Fifth Circuit expressly recognized and applied the " 'foreseeable result' test" (Pet. App. 7) established by this Court, and recently clarified in *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), and *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34 (1985). *See* Pet. App. 5-7. When the Fifth Circuit considered the matter en banc, *every* member of the Court agreed on the result required in these cases pursuant to this Court's precedents, without a single member writing separately to suggest that the Court of Appeals had in any way strayed from this Court's teachings.

The striking unanimity of the en banc court in resolving the state action immunity question presented by these cases is attributable primarily to one factor: the abundant indications in the legislative record that the State of Louisiana has adopted a policy of promoting rather than displacing competition in the market for health care services. *See id.* 7-9. This includes the "declare[d] * * * purpose" of Louisiana law to "enhance" competition between public and private health care providers on "equal[]" terms. La. Rev. Stat. § 46:1071. The overwhelming evidence that the State has *not* adopted a policy of displacing competition in the relevant market readily distinguishes the decisions below from those on which petitioners rely in attempting to manufacture a circuit conflict.

Petitioners' claim that "[f]urther guidance is needed from this Court" (Pet. 2) is overblown. This Court has enunciated the standards governing state action immunity for municipalities in two recent cases—*Hallie* and *Omni*; there is no need to revisit them so soon here. Indeed, the

complete agreement of the en banc court below on the result called for by this Court's precedents entirely undercuts petitioners' assertion that guidance is needed. In any event, this petition is a singularly ill-suited vehicle for making new law in this area, given the exceptionally clear intent of the State of Louisiana to promote competition in the relevant market. Moreover, because these cases are currently in an interlocutory posture, the Court could review them at a later date if they in fact have the unsettling effect hypothesized by petitioners. The petition should be denied.

COUNTERSTATEMENT

1. **Louisiana's Efforts to Promote Competition in the Market for Health Care Services.** The underlying cases revolve around the Louisiana law governing the creation and operation of publicly owned hospitals, or "hospital service districts." *See* La. Rev. Stat. §§ 46:1051-1068.1, 46:1071-1077.[1] Louisiana first authorized its parishes to establish such districts in 1950 to improve the "general health of the community" and "[t]o cooperate with other public and private institutions and agencies engaged in providing hospital and other health services to residents of the district." *Id.* § 46:1052(4)-(5). The districts are governed by commissions consisting of various members depending on the particular parish. *See id.* § 46:1053. Commissions are authorized to engage in certain activities necessary to the operation of hospital service districts, but do not have authority over private hospitals or the marketplace at large. *See id.* § 46:1055.

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[1] Petitioners claim that "[m]ost states in the nation have adopted statutes authorizing the creation and operation of public hospitals." Pet. 4. Regardless of whether that is so, the Louisiana statutes are unique due to the lengths to which the State has gone to foster *competition* in the market for health care services and to express its intent to do just that.

In 1984 the Louisiana legislature determined that "the market for hospital and health care services [was] becoming increasingly competitive," and that hospital service districts were at a "competitive disadvantage." *Id.* § 46:1071. In particular, the legislature noted that private "health care providers"—subject to antitrust laws—"are contracting to engage in economic joint ventures or form partnerships to offer integrated health care services to the public," and that "this increasing competition is forcing [such private providers] to develop market strategies and plans to effectively compete." *Id.* Accordingly, the legislature amended the hospital service district law "to enhance the ability of a hospital service district *to compete* effectively and *equally* in the market for health care services." *Id.* (emphases added).[2]

To achieve this "declare[d] * * * purpose," *id.*, Louisiana did two things. First, it exempted public hospitals from certain laws applicable to public agencies, including various sunshine laws. *See id.* § 46:1073B-C. Second, it gave public hospitals the same business powers that had been exercised by private hospitals in this market, including the ability to "develop marketing strategies" and "strategic plans," *id.* § 46:1073, to operate and lease medical buildings, *id.* § 46:1074, and to "advertise," *id.* § 46:1075. In 1985 the legislature added the authority—also exercised by private hospitals subject to antitrust constraints—to "contract with or engage in a joint venture with any person, corporation, partnership, or group of persons to offer, provide, promote, establish, or sell any hospital health service." *Id.* § 46:1077.

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[2] The circumstances leading to these amendments are set forth in Section 1071 of the statute. The lengthy quotation on pages 5 and 6 of the petition from the *Washington Law Review* has nothing to do with Louisiana or the statutes at issue here.

To be clear, the purpose of these amendments—as the Louisiana legislature made express, and as the statutory provisions evince—was to level the playing field in the market for health care services by enabling public hospitals to compete on "equal[]"—not monopolistic—terms. *Id.* § 46:1071. *See also* La. Att'y Gen. Op. No. 95-346 (Aug. 18, 1995) ("expressed purpose of the statute" is "to permit the hospital service district *equal* ability to compete") (emphasis added).

2. **Petitioners' Efforts to Eliminate Competition in the Market for Health Care Services.** These cases arose because petitioners—Louisiana hospital service districts—have attempted to use the authority given to them by state law "to compete" in the market for health care services to *eliminate* competition in that market. La. Rev. Stat. § 46:1071. The pertinent allegations are summarized below; given the nascent procedural posture of these cases, the allegations must be accepted as true. *See* Pet. App. 13, 59.

a. *Hospital Service District No. 1 of Tangipahoa Parish* v. *Surgical Care Center of Hammond, L.C.* Petitioner Hospital Service District No. 1 of Tangipahoa Parish owns and does business as North Oaks Medical Center ("North Oaks"). North Oaks is the largest hospital in Tangipahoa Parish, Louisiana. It provides inpatient and outpatient surgical care services as well as other acute care, and is managed by Quorum Health Resources, LLC ("Quorum"), a private company. St. Luke's SurgiCare ("St. Luke's")—a private health care facility owned and operated by respondent Surgical Care Center of Hammond, L.C. ("Surgical Care")—is located less than a mile from North Oaks. While St. Luke's is much smaller than North Oaks and only provides outpatient surgical services, it nevertheless offers local residents an alternative to North Oaks for those services. *See* Pet. App. 2-3, 12.

North Oaks and Quorum conspired to drive St. Luke's from the local market for health care services by subjecting St. Luke's to a campaign of anticompetitive conduct. This campaign included North Oaks' effort to use its monopoly power in the acute and inpatient surgical care services market to pressure managed care health plans in the area to sign exclusive contracts with North Oaks, and thus enable North Oaks to extend its monoply control to the outpatient surgical care market as well. This "tying" arrangement has stiffled competition in the surgical care market. In addition, through various actions and policies, North Oaks has sought to intimidate personnel from working at St. Luke's, thwart patient referrals or transfers to St. Luke's, and harm St. Luke's most visible physician-investors, exerting still more pressure on St. Luke's. *See id.* 12-13 & n.1, 29.

In 1997 St. Luke's filed suit against North Oaks and Quorum in the United States District Court for the Eastern District of Louisiana under the Sherman Act, 15 U.S.C. § 2, and state unfair business practices laws. Defendants moved to dismiss the federal claims on the ground that they are entitled to state action immunity under *Parker* v. *Brown*, 317 U.S. 341 (1943) and its progeny, arguing that a "foreseeable result" of the State's delegation of authority to engage in routine business acts such as contracting was the use of such authority in an anticompetitive fashion. The district court granted defendants' motion, and St. Luke's appealed. *See* Pet. App. 28-30.

b. *Richland Parish Hospital Service District 1-B* v. *Abraham*. Petitioner Richland Parish Hospital Service District 1-B owns and operates Richland Medical Center ("Richland Medical"), an inpatient and outpatient primary and second care facility serving Richland Parish, Louisiana. Richland Medical has the only significant

emergency room in the area; it is managed by Spectrum Emergency Care, Inc., a private firm. Richland Medical enters into contracts with individual physicians in the area, pursuant to which the physicians received payments for the patients they treated in Richland Medical's emergency room. Since 1996 Richland Medical officials and certain others have used boycotts, disparagement, tie-in requirements, and other anticompetitive conduct to pressure certain physicians to treat patients only at Richland Hospital. *See id.* 58 & n.17.

In 1997 respondents Ralph Abraham, M.D., Randy Head, M.D., and Ron Morgan, M.D.—individual physicians targeted by such anticompetitive conduct—filed suit against Richland Medical and certain individuals in the United States District Court for the Western District of Louisiana under the Sherman Act, 15 U.S.C. §§ 1, 2, Clayton Act, *id.* §§ 15, 26, and state unfair business practices laws. Defendants moved to dismiss the federal claims on state action immunity grounds. The district court did so, and plaintiffs appealed. *See* Pet. App. 62-64.[3]

3.a. **Fifth Circuit Decisions.** In August 1998 a panel of the Fifth Circuit—"believing it was bound to do so by prior decisions of th[at] court," *id.* 2—issued a decision in the *Surgical Care* case affirming the district court ruling that the municipal defendants were entitled to state action immunity. In so holding, the panel relied in particular

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[3] The petition also sought review of the judgment in *Willis-Knighton Medical Center* v. *City of Bossier City*. That case arose due to the anticompetitive and exclusionary efforts of the City of Bossier City, Louisiana, the Bossier City Medical Center (owned by the City), and certain individual physicians to drive the privately owned WK Bossier Health Center out of the local market for health care services. *See* Pet. App. 37-39. On September 21, 1999, this Court dismissed the petition with respect to the *Willis-Knighton* judgment pursuant to the parties' stipulation as to dismissal and S. Ct. Rule 46.1.

on *Martin* v. *Memorial Hospital at Gulfport*, 86 F.3d 1391 (5th Cir. 1996), in which the court—looking to Mississippi law—held that Mississippi had conferred state action immunity upon public hospitals to engage in certain anticompetitive acts. *See* Pet. App. 14, 17-18. Shortly thereafter, the Fifth Circuit vacated the panel decision in *Surgical Care* and set the case for reconsideration en banc.

b. The en banc court—including each member of the prior panel—unanimously held that the defendants were *not* entitled to state action immunity. In so holding, the full court first reviewed this Court's precedents, and in particular *Hallie* and *Omni*. Those cases "clarified the 'foreseeable result' test" for determining whether local government entities are entitled to such immunity. Pet. App. 7. Under this test, a state statute need not make "explicit reference to displacing competition," *id.* 6; it is enough if " 'anticompetitive effects logically would result from [a state's delegation of] broad authority to regulate' " in a particular market. *Id.* 7 (quoting *Hallie*, 471 U.S. at 42). But at the same time, the court noted, there is a difference between "a naked grant of authority to contract" and a grant of authority to engage in an activity—such as zoning—that " 'regularly has the effect of preventing normal acts of competition.' " *Id.* 6-7 (quoting *Omni*, 499 U.S. at 373).[4]

Following these teachings, the en banc court looked for "signals" from state law that Louisiana has adopted a policy of "insulat[ing]" hospital service districts from antitrust liability, but instead found just "the opposite." Pet. App. 8. "The Louisiana statute did not subject St. Luke's or any other businesses to the authority of the hospital

[4] As is clear from the en banc decision itself, in reviewing this Court's precedents, the Fifth Circuit did not "fault[] this Court" (Pet. 11) for anything, but rather carefully analyzed this Court's recent decisions. *See* Pet. App. 6-7.

service district." *Id.* at 7. "[I]t merely added to the hospital service district's list of available powers, by enabling it to form joint ventures and conduct closed meetings." *Id.* Moreover, it is "clear that the statute's purpose is to level the playing field but no more." *Id.* 8. "In § 1077, leveling the playing field is tantamount to allowing the hospital service district to form joint ventures *just as any other corporations can*, not to allowing formation of joint ventures that with any other lineage would be anticompetitive." *Id.* (emphasis added). In short, the "abundant indications" are that the State's policy is to *support* competition in the relevant market—not to displace it. *Id.* (quotation omitted).

The Court of Appeals distinguished the *Martin* decision, by which the initial panel felt bound. That case involved "a statutory grant of authority to a hospital board" in Mississippi that, among other things, "operated under a certificate of necessity by which the State of Mississippi expressed its intent that its creature be a sole supplier of a medical service," a fact on which the *Martin* panel expressly relied. *Id.* 10; *see Martin*, 86 F.3d at 1400 (explaining that "state's certificate of need program necessarily displaces unfettered competition" in the relevant market); *id.* at 1399 (same). Louisiana law places no such over-arching regulatory controls over the hospital services market. "*Martin* read at its best drew upon the complete context of the [Mississippi] legislation, including the role of a certificate of necessity." Pet. App. 10.[5] The

[5] The court's emphasis on the certificate of need program in *Martin* accords with the treatment of such programs by other courts. *See, e.g., FTC* v. *Hospital Bd. of Dirs. of Lee Cty.*, 38 F.3d 1184, 1192 (11th Cir. 1994) (state's adoption of certificate of need program supported conclusion that "anticompetitive conduct was reasonably anticipated"); *North Carolina ex rel. Edmisten* v. *P.I.A. Asheville, Inc.*, 740 F.2d 274, 277-278 (4th Cir. 1984) (en banc) (North Carolina certificate of need law strongly indicated state

overwhelming contrary evidence that the Louisiana hospital service district law was designed to enhance competition in the relevant market required a different result.

Because the defendants in the *Surgical Care* case were not entitled to state action immunity under this Court's precedents and the Louisiana scheme, the Court of Appeals reversed and remanded the case "for further proceedings." *Id.* 2.

c. Shortly after the en banc decision in *Surgical Care*, the Fifth Circuit issued a decision in the *Richland Parish* case, holding that "[i]n light of the court's recent *en banc* decision in [*Surgical Care*]," the defendants in that case were not entitled to state action immunity either. *Id.* 53. Accordingly, the *Richland Parish* case, too, was reversed and remanded for further proceedings. *Id.* 54.

REASONS FOR DENYING THE WRIT

I. THE UNANIMOUS FIFTH CIRCUIT EN BANC RULING EXPRESSLY RECOGNIZES AND FAITHFULLY APPLIES THIS COURT'S PRECEDENTS.

1. There is no conflict between the Fifth Circuit decisions below and this Court's precedents. The Fifth Circuit quoted verbatim and carefully applied "the 'foreseeable result' test" established by this Court for determining when local government entities are entitled to state action immunity. *See id.* 7. While petitioners attempt to make

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policy to displace competition), *cert. denied*, 471 U.S. 1003 (1985); *see also* Scott D. Makar, *Antitrust Immunity Under Florida's Certificate of Need Program*, 19 Fla. St. U. L. Rev. 149, 150 & n.4 (1991) ("Certificate of need programs impose extensive regulatory controls on entry into health care service markets and on investments in health care facilities.") (citing sources). Petitioners do not suggest otherwise; indeed, they completely ignore *Martin*.

something of unconnected words or phrases plucked from the en banc decision, they all but acknowledge that the court grounded its approach in *Omni* and *Hallie*. *See* Pet. 15 ("the Fifth Circuit purported to derive its * * * view of antitrust immunity from the facts of *Town of Hallie* and *City of Columbia*"). Every member of the en banc court agreed with the result called for under *Omni* and *Hallie*, and—despite petitioners' spin on it—that outcome is right in step with this Court's precedents.[6]

2. Local government entities are not automatically entitled to state action immunity because—unlike States—they are not themselves sovereign. *Omni*, 499 U.S. at 370. Instead, to be cloaked with such immunity, local entities must "demonstrat[e] that their anticompetitive activities were authorized by the *State* pursuant to a state policy to *displace competition* with regulation or monopoly public service." *Hallie*, 471 U.S. at 39 (quotation omitted; emphases added). *See id.* at 44 (state policy to displace competition must be "clearly articulated and affirmatively expressed") (quotation omitted).

In adopting such a policy, a State need not "explicitly permit[] the displacement of competition." *Omni*, 499 U.S. at 372. And—contrary to the suggestion of petitioners (Pet. 16)—the Fifth Circuit specifically recognized as much. *See* Pet. App. 6 (explaining that in *Hallie*

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[6] Petitioners suggest that the outcome in these cases was not clear-cut because the district courts and initial *Surgical Care* panel concluded that petitioners were entitled to immunity. Pet. 20. But those courts each felt obligated to reach that result by the Fifth Circuit's prior *Martin* decision involving Mississippi Law. *See* Pet. App. 17, 28, 47-48, 63. The en banc court—which was not bound by *Martin*—quickly corrected that misunderstanding of *Fifth Circuit* law. *Id.* 10. Presumably, that explains why each member of the initial *Surgical Care* panel *joined* the en banc decision reversing and remanding the case.

municipality was entitled to immunity even though "state statute made no explicit reference to displacing competition"). But, as this Court has held, a State must do more than merely confer the "authority to regulate"; it must legislate in such a fashion that the "suppression of competition is the '*foreseeable result*' of what the state statute authorizes." *Omni*, 499 U.S. at 373 (emphasis added). *See also id.* at 372 ("[*b*]*esides* authority to regulate, * * * the *Parker* defense *also* requires authority to suppress competition") (emphases added); *Hallie*, 471 U.S. at 39. The Fifth Circuit explicitly recognized and applied "th[is] 'foreseeable result' test." Pet. App. 7.

Petitioners seize on the Fifth Circuit's observation in dictum that a "distinction" may be drawn between "a statute that in empowering a municipality [to regulate] necessarily contemplates the anticompetitive activity [at issue] from one that merely allows a municipality to do what other businesses can do." *Id.*; *see* Pet. 14. According to petitioners, this observation—in and of itself—has the effect of "convert[ing] this Court's 'foreseeability' test into a far more stringent requirement." Pet. 14. This conclusion would surely come as a surprise to the Fifth Circuit—which specifically embraced "the 'foreseeable result' test." Pet. App. 7. But, in any event, this distinction follows naturally from *Omni* and *Hallie*, not to mention application of simple common sense.

In *Omni* this Court held that the State had adopted a policy to displace competition by authorizing municipalities "to regulate the size, location, and spacing of billboards," since "[t]he very purpose of [such] zoning regulation is to displace unfettered business freedom in a manner that *regularly* has the effect of preventing normal acts of competition, particularly on the part of new entrants." 499 U.S. at 371, 373 (emphasis added). *See LaSalle Nat'l Bank* v. *County of DuPage*, 777 F.2d 377,

383 (7th Cir. 1985) ("[b]y definition zoning * * * engrafts upon laissez-faire capitalism a regulatory scheme controlled by political institutions"), *cert. denied*, 476 U.S. 1170 (1986).[7] The Louisiana statutes here, by contrast, merely authorize municipalities to *participate* in a particular market.

Similarly, *Hallie* involved a challenge to a city's refusal to provide sewage services to surrounding areas unless the areas agreed to be annexed. In asserting state action immunity, the city relied upon a state statute giving municipalties the authority to "provide sewage services and also to determine the areas to be served." 471 U.S. at 42. In light of this statute, the Court had little difficulty in concluding that the challenged anticompetitive conduct—monopoly control over sewage services—was foreseeable, and that the statutes evinced a "state policy to displace competition with regulation in the area of municipal provision of sewage services." *Id.* at 44. As in *Omni*, it was "clear that anticompetitive effects *logically would* result from this broad authority to regulate" activities in the relevant market. *Id.* at 42 (emphasis added).

As the Fifth Circuit recognized (Pet. App. 7-8), the Louisiana statutory scheme at issue here is worlds removed from the statutes in *Omni* and *Hallie*. The Louisiana hospital service district law does not purport to confer upon municipalities *any* regulatory authority over the pertinent market (like the statutes in *Omni* and *Hallie*), nor does it begin to sanction what amounts to monopoly public service (like the statute in *Hallie*).

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[7] Petitioners argue that "not *all* zoning is anticompetitive." Pet. 15 (quotation omitted; emphasis in original). Perhaps. But zoning —unlike ordinary commercial activities such as contracting—"*regularly* has the effect of preventing normal acts of competition, particularly on the part of new entrants." *Omni*, 499 U.S. at 373 (emphasis added).

Rather, it simply authorizes municipalities to engage in commercial activities routinely undertaken by private firms doing business in the same market. When exercised, this authority does not logically or foreseeably "displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition." *Omni*, 499 U.S. at 373. Quite the contrary. The foreseeable result of the Louisiana statutory scheme is that public hospitals will *compete*, not that they will displace competition by or with others.[8]

Petitioners are also wrong in claiming that the Fifth Circuit held that local government entities are only entitled to state action immunity "when state law [specifically] provides for the 'displacement of competition.'" Pet. 16. The Court of Appeals not only eschewed such an approach, but went out of its way to say that "courts will *not* police states to insist that its legislatures use words federally dictated" and that, instead, "[w]e will find a purpose to insulate local government when language and context *fairly* locate a state policy to displace competition." Pet. App. 9 (emphases added). Quite apart from requiring Louisiana to use a magical phrase,

[8] As the Fifth Circuit recognized (Pet. App. 7-8), there is nothing inherently anticompetitive about contracting. Firms may always seek to enter into anticompetitive contracts, but contracting authority—unlike zoning authority—does not have as its "very purpose" the displacement of "unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition." *Omni*, 499 U.S. at 373. As the commentators on which petitioners themselves rely put it, there is no more reason to foresee that a statute authorizing a municipality "to contract" will result in contracts that violate the antitrust laws than there is to foresee that such a statute will result in contracts that "involve[] unlawful race discrimination, fraud, or embezzlement." I Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 225, at 454 (1997).

the Court of Appeals merely gave effect to the State's express intent to promote competition in the relevant market.

3. Even if the Fifth Circuit had strayed from this Court's teachings—which it did not—there would be no need for this Court's intervention here. However the state action immunity test is articulated, petitioners cannot meet it under the facts here. The touchstone of state action immunity is the existence of a "state policy to *displace* competition" in the relevant market. *Hallie*, 471 U.S. at 39 (emphasis added). *See Omni*, 499 U.S. at 372 ("the *Parker* defense * * * requires authority to *suppress* competition—more specifically, clear articulation of a state policy to authorize anticompetitive conduct") (emphasis added; quotation omitted). Louisiana has expressly adopted precisely the *opposite* policy in the market for health care services. *See supra* at 3-5.

Petitioners quibble with the Fifth Circuit's reading of Louisiana law. *See* Pet. 18-19. But there is nothing cert-worthy about that and, in any event, they are wrong. As the Fifth Circuit concluded, Section 1071's statement of purpose extends to Section 1077 as well as Sections 1072-76. *See* Pet. App. 8.[9] The Fifth Circuit did not—and did

[9] Because Section 1077 was enacted one year after Sections 1071-76, petitioners suggest that Section 1077 should be interpreted without regard to Section 1071. *See* Pet. 18-19. But Section 1077 was obviously enacted in the same vein as Sections 1071-76. Indeed, Sections 1071-77 all fall under the same heading of title 46 of the Louisiana Code—"Part II. *Competition*" (emphasis added)—and, in discussing the powers that public hospitals needed "to compete" on "equal[]" terms with private hospitals, Section 1071 specifically states that private hospitals "are contracting to engage in economic joint ventures * * * to offer integrated health care services." La. Rev. Stat. § 46:1071. Moreover, under Louisiana law, "[l]aws on the same subject matter must be interpreted in reference to each other." La. Civ. Code art. 13. *See also Malone* v. *Cannon*, 41 So. 2d 837, 843 (La. 1949) ("It is a well established rule that in the construction of a particular statute, or in the interpretation of its

not have to—read the word "equally" to mean "identically," as petitioners suggest. Pet. 19. The court merely concluded that "the word 'equally' qualifies 'effectively,' making clear that the statute's purpose is to level the playing field but no more." Pet. App. 8.[10] Any other reading would defy the statute's plain meaning. As the Fifth Circuit concluded—in light of the statute's declared purpose to enhance competition, and delegation of ordinary business powers to achieve that result—the " 'notwithstanding any other law to the contrary' " clause is far too cryptic to evince a state policy to displace competition. *Id.* (quoting La. Rev. Stat. § 46:1077).

4. The Court should see through petitioners' "federalism" waving. *See* Pet. 2-3, 14, 30. While the state action immunity doctrine is rooted in principles of federalism and state sovereignty, those principles are not directly implicated when, as here, immunity is asserted by local government entities. More to the point, those principles counsel in favor of respecting—not disregarding—state

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provisions, all statutes relating to the same subject * * * should be read in connection with it, as together constituting one law, although they were enacted at different times, and contain no reference to one another.").

[10] The statutory scheme also supports this construction. In 1984 Louisiana found that private hospitals—subject to the antitrust laws—"are contracting to engage in economic joint ventures or form partnerships to offer integrated health care services to the public," and that "this increasing competition is forcing [such private providers] to develop market strategies and strategic plans to effectively compete." La. Rev. Stat. § 46:1071. Thus, it amended the hospital service district law to give public hospitals the authority to engage in the same business acts—*i.e.*, the authority to contract and enter into joint ventures (Section 1077) and to adopt market strategies and strategic plans (Section 1073)—"to enhance the ability of a hospital service district to compete effectively and *equally* in the market for health care services." *Id.* (emphasis added). The "other inherent disadvantages under which public hospitals [supposedly] operate" are entirely of petitioners' own creation, Pet. 19-20; they are nowhere mentioned in the statute.

law. As this Court has emphasized, federal courts must demand "real compliance" with the "foreseeable result" test "to make clear that *the State* is responsible for the [anticompetitive conduct] it has [allegedly] sanctioned and undertaken to control." *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992) (emphasis added). Otherwise, the federal courts would be "compel[ling] a result that the States do not intend but for which they are held to account." *Id.* That is the precise result petitioners demand here, and the Fifth Circuit—following this Court's teachings—properly declined to take their bait.[11]

II. THERE IS NO GENUINE CONFLICT BETWEEN THE DECISIONS BELOW AND THOSE OF ANY OTHER CIRCUIT.

Petitioners' laborious efforts to establish a circuit conflict also fail. Petitioners have not—and cannot—point to a single decision from another circuit finding state action immunity in which the underlying statutory scheme so plainly evinces an intent to enhance competition in the relevant market, as the Louisiana statutes do here. The different outcomes in the decisions below and the decisions to which petitioners point from other circuits are not attributable to any doctrinal divide on the application of the state action immunity doctrine, but rather to discrepancies in the underlying statutory schemes. Moreover, because a municipality claiming state action immunity "must demonstrate that it is engaging in *the challenged activity* pursuant to a clearly expressed state policy,"

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[11] As the Fifth Circuit put it: "To infer a policy to displace competition from, for example, authority to enter into joint ventures or other business forms would stand federalism on its head. A state would henceforth be required to disclaim affirmatively antitrust immunity, at the peril of creating an instrument of local government with power the state did not intend to grant." Pet. App. 9-10.

Hallie, 471 U.S. at 40 (emphasis added), even the same state statutory scheme could yield different immunity outcomes depending on the particular anticompetitive conduct challenged. There is no conflict.

1. Most decisions cited by petitioners are distinguishable in that the state statutes held to confer immunity did not simply permit public hospitals to engage in ordinary commercial activities like contracting, but rather specifically authorized hospitals to engage in the precise anticompetitive conduct at issue—*e.g.*, denying staff or practice privileges. *See, e.g., Crosby* v. *Hospital Auth. of Valdosta & Lowndes Cty.*, 93 F.3d 1515, 1533 (11th Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997); *Bolt* v. *Halifax Hosp. Med. Ctr.*, 980 F.2d 1381, 1386 (11th Cir. 1993); *Coastal Neuro-Psychiatric Assocs., P.A.* v. *Onslow Mem'l Hosp., Inc.*, 795 F.2d 340, 341-342 (4th Cir. 1986). In the cases below, by contrast, petitioners rely on general grants of authority to undertake ordinary commercial activities—such as contracting or advertising—to engage in a wide array of anticompetitive acts that are by no means directly authorized by state law.

2. *FTC* v. *Hospital Board of Directors of Lee County*, 38 F.3d 1184 (11th Cir. 1994), is closer but still distinguishable. In that case, the Eleventh Circuit held that delegation of "extensive authority to operate, control, and maintain a public hospital" conferred upon a public hospital state action immunity from a suit challenging the hospital's anticompetitive acquisition of another hospital. *Id.* at 1188; *see id.* at 1191. Petitioners claim that the Florida statute in *Lee County* is "indistinguishable from the Louisiana [hospital service district] law." Pet. 22. Not so. To name just one discrepancy: unlike the Louisiana statutory scheme, the delegation of authority to operate public hospitals in the Florida statute was *not* ac-

companied by an express intent on the part of the state to promote competition on equal terms in the market for health care services. That distinction is itself outcome determinative.

Lee County is also distinguishable in that, as the Fifth Circuit explained, "[i]n finding antitrust immunity, the [Eleventh Circuit] emphasized that when the legislature authorized a hospital to acquire other hospitals, it already knew that the hospital was a monopoly." Pet. App. 9. *See* 38 F.3d at 1192 ("In 1987, the legislature, with the knowledge that it had given the Board the power to create a monopoly in 1963, further expanded the implicit power of the Board to acquire other hospitals. Thus, * * * the legislature must have reasonably anticipated that further acquisitions, resulting from the 1987 legislation, would increase the Board's market share in an anticompetitive manner."[12] "That is," as the Fifth Circuit put it below, "the polar opposite of this case, in which the state sought to eliminate a competitive disadvantage suffered by the public hopsital and instead establish a market in which the hospital could compete on equal terms." Pet. App. 9.

Petitioners go to great lengths to establish that the Fifth Circuit has adopted a different standard than the Eleventh

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[12] Petitioners claim that the Eleventh Circuit has not subsequently considered whether "the relevant state law regulated a pre-existing monopoly." Pet. 25. But that is beside the point. The court of appeals expressly relied on this fact in deciding *Lee County*, the principal decision on which petitioners ground their claim of a circuit conflict. And, as the *Lee County* court explained, the legislature "must have reasonably anticipated that further acquisitions" would only increase the hospital's monopoly power. 38 F.3d at 1192. That the challenged anticompetitive conduct in *Lee County* involved the acquisition of another hospital also distinguishes it from the cases below, which involve anticompetitive conduct of a much different stripe.

Circuit for determining when municipalities are entitled to state action immunity. *See* Pet. 22-24. But the en banc Fifth Circuit, for one, does not agree with that assessment. *See* Pet. App. 9 ("The [Eleventh Circuit]'s application of its foreseeability test * * * is broadly *consistent* with the result here.") (emphasis added). And it does not follow from *Lee County;* indeed, there the Eleventh Circuit specifically "recognize[d] that there must be some showing that the anticompetitive results were more than merely plausible." 38 F.3d at 1191 n.6 (quotation omitted).[13] Mere plausibility is all that can be shown from the statutory scheme here, except that the same scheme expressly states that the delegated business authority should be exercised in a *competitive* rather than monopolistic fashion.

3. The asserted conflict does not fare any better in the case of *Coastal Neuro-Psychiatric Assocs., P.A.* v. *Onslow Memorial Hospital, Inc., supra.* As the Fifth Circuit recognized (Pet. App. 8-9), in *Coastal Neuro* the Fourth Circuit held that public hospitals were entitled to state action immunity in restricting physician privileges pursuant to a statute "giv[ing] hospitals the power to determine which physicians may practice with them." 795 F.2d at 341. In reaching that result, the Fourth Circuit specifically relied on the regulatory character of the authority being ex-

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[13] This categorical statement belies petitioners' citation to *Bankers Insurance Co.* v. *Florida Residential Property & Casualty Joint Underwriting Ass'n,* 137 F.3d 1293 (11th Cir. 1998), for the proposition that in the Eleventh Circuit the foreseeable result test is satisfied as long as the statutory authority may conceivably be exercised in an anticompetitive fashion. *See* Pet. 25. In any event, *Bankers Insurance*—which is not a public hospital case at all—is readily distinguishable from the cases here in that the Eleventh Circuit there concluded that "the legislature *explicitly* contemplate[d]" that the local government entity would engage in the challenged anticompetitive conduct, and in that the same entity "was not created to compete in" the relevant market. 137 F.3d at 1297-98 (emphasis in original).

ercised in an anticompetitive fashion. *See id.* at 342 ("The North Carolina legislature must have foreseen this anticompetitive consequence and decided that the *regulatory* benefits conferred by the statute simply outweighed it.") (emphasis added). In that regard, the North Carolina provision at issue in *Coastal Neuro* is much closer to the statutory schemes in *Omni* and *Hallie*—which gave local governmental entities broad regulatory authority over the pertinent markets—and is entirely different from the Louisiana statutes here—which, as discussed, simply authorize hospital service districts to act as commercial participants in the health care services market.[14]

4. The case that comes closest to the facts here is *Lancaster Community Hospital* v. *Antelope Valley Hospital District*, 940 F.2d 397 (9th Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992), and—as petitioners themselves acknowledge—the court there "reached the same result as the decisions below." Pet. 21. In *Lancaster Hospital* the Ninth Circuit rejected the public hospital's argument that the delegation of "the powers needed to engage in the hospital business," including broad authority to "enter into contracts," conferred state action immunity on the hospital to enter into anticompetitive contracts. *Id.* at 402-403 nn.11-12. As the court explained, "the state has given the defendants no power to regulate the hospital services market, but has merely authorized them to provide hospital services along with regular [private] competitors." *Id.* at 402 (footnote omitted). "[T]he foreseeable result of [such a] statutory scheme * * * is that [municipalities] will

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[14] Petitioners claim that "Louisiana has granted its municipalities indistinguishable authority [from that granted under the North Carolina statutes] to create and operate hospitals." Pet. 26. But here again, petitioners completely overlook the express intent of the Louisiana scheme to "enhance" competition on "equal[]" terms in the market for health care services, La. Rev. Stat. § 46:1071, a provision completely absent from the North Carolina scheme.

compete, not that they will preclude competition by others." *Id.* at 403 (emphasis added). The same goes for the Louisiana scheme here.

More to the point, like the en banc Fifth Circuit below, the *Lancaster Hospital* court recognized that "we have before us numerous concrete legislative actions that indicate [that the State], instead of making regulation the order of the day in the hospital service sector of the economy, has committed itself to a *competitive* market." *Id.* (emphasis added). In denying state action immunity, the court simply gave effect to that clear intent. None of the other cases on which petitioners rely in attempting to establish a circuit conflict involved such an obvious effort on the part of the State "to enhance competition rather than replace it" in the health care services market. *Id.* That is a complete answer to petitioners' claim that the circuits are in conflict in any way implicated by the decisions below.[15]

III. THE PETITION IS A SINGULARLY ILL-SUITED VEHICLE TO ADDRESS ANY OF THE BROADER DOCTRINAL ISSUES RAISED BY PETITIONERS.

While petitioners posit that the state action doctrine is in a state of intolerable disarray, none of the lower court decisions on which they rely recognizes any such confusion, and the entire Fifth Circuit below unanimously

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[15] In *Redwood Empire Life Support* v. *County of Sonoma*, —— F.3d ——, 1999 WL 700577 (9th Cir. Sept. 10, 1999), the Ninth Circuit held that the County of Sonoma was entitled to state action immunity for an exclusive ambulance services contract entered into with a private firm. But as the court emphasized, the underlying state statute there—governing emergency medical care—specifically "explains that the California Legislature, by enacting [the Act], intended to confer state action immunity from federal antitrust laws for actions taken by local governmental entities under [the Act]." *Id.* at *1. The statute involved in *Lancaster Hospital* contained no such provision.

agreed on the result called for by *Omni* and *Hallie* here. The fact that some scholars regard state action immunity as a "difficult issue for the Court, and thus for those who follow it," Pet. 29 (quotation omitted), does not suffice under the standards that typically govern the grant of certiorari, *see* S. Ct. Rule 10; if it did, those standards would be seriously relaxed, given the variety of "difficult issues" with which this Court regularly deals. At most, petitioners have offered the trappings of a law review article, not an issue warranting plenary review by this Court.

Even if there were a need for further guidance on the application of the "foreseeable result" test, this case would be a singularly inappropriate vehicle for providing such guidance. As discussed, the decisions below are firmly grounded in the specifics of the Louisiana hospital service district law. *See* Pet. App. 7-9. In addition, while petitioners claim the Fifth Circuit "ruled with an exceedingly broad brush," Pet. 29, the en banc court pointedly admonished that "courts will *not* police states to insist that its legislatures use words federally dictated" and that, instead, "[w]e will find a purpose to insulate local government when language and context *fairly* locate a state policy to displace competition." Pet. App. 9 (emphasis added). *See also id.* 4 ("a state may express its will as it prefers").

Finally, if the decisions below *do* have the unsettling effect hypothesized by petitioners, this Court may still review them later. The interlocutory posture of the decisions below provides yet another reason for denying the present petition. *See Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.") (Scalia, J., respecting the denial of the petition for writ of certiorari).

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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